

IN RE RED TOP SALVAGE I TIMBER SALE

IBLA 98-3

Decided January 6, 1998

Appeal from a decision of the Roseburg District Office, Bureau of Land Management, rejecting a protest to a proposed timber sale. OR-100-TS97-12.

Affirmed.

1. Timber Sales and Disposals

Where the evidence establishes that, with respect to the specific timber sale under review, there is no basis upon which to support a finding that the sale is in violation of environmental constraints, an appeal from the rejection of a protest of that sale will be denied, notwithstanding the fact that the record also would support a determination that other timber sales approved at the same time may not have been examined for conformity with applicable environmental standards.

APPEARANCES: Francis Eatherington, Roseburg, Oregon, for Umpqua Watersheds, Inc.; Alan R. Wood, South River Resource Area Manager, for the Roseburg District Office, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Umpqua Watersheds, Inc. (Umpqua), has appealed from a determination of the Roseburg District Manager, Oregon State Office, Bureau of Land Management (BLM or the Bureau), rejecting a protest to the Red Top Salvage I (Red Top) timber sale, contract No. OR-100-TS97-12. Umpqua has also requested that the Board stay action under this timber sale pending substantive review of its appeal as provided by 43 C.F.R. § 4.21(b), because, pursuant to 43 C.F.R. § 5003.3(f), the authorized officer decided to proceed with the sale during the pendency of the appeal. For reasons stated below, we affirm the decision under appeal and, accordingly, deny the request for a stay.

The sale in question was conducted on August 26, 1997, and involves a total of 364 acres in six units. While all of the areas scheduled for harvesting are part of a salvage sale of trees which were downed and damaged by severe winter storms in December 1995 and January and February, 1996, two of these units (Nos. 3 and 4), aggregating 127 acres, are to be salvaged under a final regeneration cut which would leave approximately 12 to 18 trees per acre remaining after harvest.

[1] While Umpqua generally challenges all aspects of the proposed sale, most of its criticism is centered on the two final regeneration harvests. These regeneration harvests, it argues, are in direct violation of the Deadman/Dompier Watershed Analysis (DDWA) which had been prepared by the South River Resource Area of the Roseburg District in April 1997. This study had divided the Deadman/Dompier Watershed into seven subwatersheds, including the East Deadman, Middle Deadman, and West Deadman. Based on a detailed analysis of existing conditions throughout the watershed, various recommendations were made for future management protocols. Included among these was the recommendation that BLM "[d]efer scheduled regeneration harvesting activities for at least ten years in the East, West, and Middle Deadman subwatersheds so that they may recover hydrologically." (DDWA at 45.) Appellant argues that the sale units programmed for regeneration harvests under the Red Top sale are both located within the West Deadman subwatershed and, therefore, the proposed regeneration harvest is in violation of the DDWA. See Statement of Reasons (SOR) at 2. Appellant also suggests that the only reason that these two regeneration harvests were included in the proposed sale was to make the salvage sale more economically viable.

In response, BLM points out that the DDWA specifically referred to deferral of "scheduled" regeneration harvesting activities and that this is not a "scheduled" regeneration cut but rather one which was occasioned by the need to salvage downed and damaged timber. In this regard, it seeks to differentiate between regeneration harvests of units "selected to meet the socio-economic goals of the Roseburg District Resource Management Plan (RMP), and those designed in response to unpredictable natural events, such as storms or fires." (BLM Answer at 2.) While recognizing that Umpqua asserts that the two regeneration cut units were not heavily damaged by the storm, see SOR at 4, BLM notes that Umpqua provides no proof of this assertion. Moreover, BLM points out that Umpqua's claim that these two units did not sustain heavy blow-down damage is expressly contradicted by the BLM silviculturist's report. See Ex. 55, at 1-2. The Bureau notes that, in any event, one of those units, sale unit No. 4, is not in the Deadman/Dompier drainage, and, thus, this unit would not be covered by the DDWA prescriptions.

Our review of the record before the Board substantiates BLM's position on the question of the consistency of the regeneration harvests with the DDWA. Umpqua's assertions to the contrary notwithstanding, the genesis for offering all units involved in this sale was clearly the desire to salvage downed and damaged timber both to avoid timber volume loss through decay and, at the same time, prevent large-scale insect infestations throughout the area. That BLM has, in two instances, chosen to salvage such timber by a regeneration cut does not change this essential fact nor does it metamorphose these cuts into "scheduled regeneration cuts" within the meaning of the DDWA. Umpqua's complaints on this point must be rejected.

The other major challenge which Umpqua makes with respect to the Red Top sale involves its claim that this sale, as well as other actions covered by Biological Assessments (BA's) prepared for the Middle South Umpqua, is in violation of the Aquatic Conservation Strategy (ACS) adopted under

the Northwest Forest Plan (NFP). Thus, Umpqua notes that the BA matrix indicators selected by BLM confirmed that, with respect to the 13 actions for which a biological opinion was ultimately sought, all would "degrade" rather than "restore" the watershed. Arguing that the Middle South Umpqua River is a "Key Watershed," Umpqua complains that "BLM is degrading this watershed not only on the project and site specific levels, but also on the larger watershed level." (SOR at 6.) This, Umpqua asserts, is a clear violation of the ACS.

Further, Umpqua directly challenges claims made by BLM that the September 26, 1996, Biological Opinion, issued by the National Marine Fisheries Service (NMFS), constituted a finding that the Red Top sale was consistent with the ACS. In this regard, Umpqua asserts that the Level 1 consultation team which had purportedly cleared the project was not charged with the responsibility for determining compliance with the ACS. Thus, Umpqua argues, the fact that NMFS issued a Biological Opinion determining that various proposed actions, including the Red Top timber sale, would not jeopardize the continued existence of the Umpqua River cutthroat trout did not establish that the project otherwise complied with the ACS.

In support of this last allegation, Umpqua has included two documents with its appeal. The first of these is an August 4, 1997, letter prepared jointly by a Forest Service Fish Biologist and a BLM Fish Biologist, both of whom were part of the Level 1 team 1/ for the Upper Umpqua Basin

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1/ Without going into too great a detail, suffice it for our present purposes to note that, under the "Guidance for Streamlining Consultation Procedures under Section 7 of the Endangered Species Act," three teams were established. The Level 1 team consisted of biologists and botanists designated by their respective agencies. This level had the responsibility for reviewing BA's for accuracy and project determinations for consistency as well as accuracy. It was expressly provided that findings were to be by consensus. Where consensus could not be achieved, Level 1 teams would elevate the matter to Level 2 teams. It was noted, however, that "[i]t is expected that all potentially contentious issues will be aired at this level, and most or all will be resolved before elevation is necessary." (Ex. A2, at 12.)

Level 2 teams were composed of field unit line officers or staff supervisors. Among the Level 2 team duties was the task of resolving disputed issues including questions involving compliance with standards and guidelines. Issues which the Level 2 team were unable to resolve would be elevated to the Regional Technical team, Interagency Coordinators, or the Regional Executive level. (Ex. A2, at 12.)

The Level 3 team (the Regional Technical team) was composed of regional technical specialists who were not line officers or supervisors. The function of this team was to provide overall process oversight and technical assistance; it was not to make project-level or policy decisions which were committed, instead, to Level 2 teams and Regional Executives. (Ex. A2, at 13.)

Province. See Ex. A2, at 36. In this letter, which was sent to the Regional Director and the Chief of the Habitat Conservation Division for NMFS, these team members challenged statements appearing in two Biological Opinions, issued in June and July of 1997, respectively, which had claimed that "the Level 1 team for the upper Umpqua River basin \* \* \* found 'that the subject timber sales are consistent with the \* \* \* Aquatic Conservation Strategy objectives.'" This statement, these two members of the Level 1 team averred, was "simply untrue." See SOR, Attachment 1, at 1.

According to the August 4, 1997, letter, it was the understanding of these two individuals that they were not to address the issue of whether or not the proposed actions were consistent with ACS objectives. Indeed, they affirmatively declared that "in our professional opinion, there are numerous actions covered \* \* \* that are not consistent with achieving one or more of the objectives of the Aquatic Conservation Strategy." See SOR, Attachment 1, at 2.

It is to be noted that the August 4, 1997, letter did not, under its own terms, relate to the September 26, 1996, Biological Opinion, but rather was directed to two subsequent Biological Opinions issued by NMFS on June 18, 1997, and July 22, 1997, respectively. However, in responding to criticism of the August 4 letter by the Chief, Habitat Conservation Division, NMFS, Northwest Region, the Forest Service biologist wrote a note to the record, dated September 17, 1997, which tied the allegations made in the August 4, 1997, letter directly to the September 26, 1996, Biological Opinion.

This September 17 note attempted to explain how the two individuals who had written the August 4 letter had come to the conclusion that they were not to examine consistency of proposed actions with the ACS. As the Forest Service biologist explained it, this understanding was based on their experience with respect to the September 26, 1996, Biological Opinion:

In the fall of 1996, shortly after the final decision to list the Umpqua River cutthroat trout as an Endangered species, the NMFS issued two documents pursuant to Section 7 consultation requirements. The first, dated September 9, 1996, is a Concurrence Letter for "Not Likely to adversely affect" actions and second, a Biological Opinion, dated September 26, 1996, for "Likely to adversely affect" actions. It is the second document, the Biological Opinion, that set the precedent when it included seven Roseburg BLM timber sales that featured regeneration harvest. These are listed in Table 1 (page 5) of the Opinion. In that Opinion, the NMFS (not the Level 1 Team) concluded that those actions would not jeopardize the continued existence of the Umpqua cutthroat trout. In order to make this finding, the NMFS (not the level 1 Team) also found that all actions will promote attainment of the ACS objectives. As late as September 9, 1996, the Level 1 Team expressed serious reservations about these and other timber sales in the basin (9/9/96 Concurrence Letter, Table 2). These reservations were in regard to achieving the purposes of the Streamlined Consultation process; namely, whether these actions would jeopardize the continued existence of the

[Umpqua River cutthroat trout], whether the ACS objectives would be met, and ultimately, whether these actions would further the conservation and recovery of an Endangered species. Yet, with no further consultation with the Level 1 Team, the NMFS authorized the seven timber sales in the September 26, 1996, Biological Opinion. There were no Level 1 Team meetings between August 20, 1996, and September 26, 1996, the date the Biological Opinion was issued. There were Level 2 and Level 3 Team meetings, however, on September 10 and 11, 1996. Sometime between the September 11, 1996 Level 2/Level 3 meeting and the September 26, 1996 Biological Opinion, someone determined that the actions would not jeopardize the continued existence of [Umpqua River cutthroat trout] and was consistent with the Northwest Forest Plan, including the ACS objectives. It was not the Level 1 team.

(SOR, Attachment 2, at 2.) Appellant argues that the foregoing clearly shows that ACS consistency with respect to the Red Top sale was not examined within the confines of the Biological Opinion and that, therefore, BLM cannot rely on the existence of the September 26, 1996, Biological Opinion as establishing such consistency.

The Bureau has responded to this allegation by pointing out that the BA's were prepared to assess the impact of proposed activities on the Umpqua River cutthroat trout, an endangered species, and that they were utilized simply as a basis for requesting formal consultation with the NMFS. They were not, BLM emphasizes, designed to examine the question of compliance with ACS objectives over the long term.

More relevantly, BLM notes that its own conclusion that the sale was in conformity with the ACS was not based on the BA matrix checklist but on an independent environmental assessment (EA) analysis as well as upon the conclusion expressly proffered in the September 26, 1996, Biological Opinion that "all of the actions addressed in this Biological Opinion are fully consistent with the NFP ACS objectives." See BLM Answer at 3, citing Ex. 53, at 16. And, to the extent that Umpqua has attempted to rely on the declarations of the two fish biologists that ACS consistency was not examined within the confines of the streamlined consultation procedures for section 7, BLM relies on the response of the Chief, Habitat Conservation Division, NMFS, Northwest Region, dated August 15, 1997. See Ex. A1.

In this August 15 letter, the Chief challenged the assertions of the fish biologists that they had been instructed not to determine consistence of the proposed actions with ACS. She affirmatively declared that no NMFS "executive" had provided such instruction and asserted that "NMFS' Level 1 team members indicate that they were not directed to avoid addressing the ACS objectives during Level 1 team reviews." Id. at 2. Moreover, the Chief noted that, in fact, any determination that subject timber sales would not jeopardize the continued existence of the Umpqua River

cutthroat trout was itself necessarily "based in part on the fact that the proposed actions are considered consistent with the ACS objectives, as determined by the Level 1 team." (Ex. A1, at 3.)

From our review of the record, a number of points can readily be made.

Notwithstanding BLM's assertions, a review of the EA (Ex. 23) fails to disclose any significant analysis of the consistency of the proposed action and ACS objectives. While it is true that the Decision Documentation does declare that "[t]he Aquatic Conservation Strategy objectives would be met," see Ex. 23, at 1, there is simply no substantive analysis of this issue in the EA, nor any explanation of the basis for the stated conclusion.

Insofar as the question of whether or not the September 26, 1996, Biological Opinion necessarily subsumed a finding of consistency with ACS objectives is concerned, 2/ certain observations, we believe, are in order.

First of all, the fact that neither the "executive" officials of NMFS nor their delegates to the Level 1 and Level 2 teams felt any preclusion from determining a proposal's compliance with ACS objectives in the context of approving a "non-jeopardize" Biological Opinion does not undermine the credibility nor diminish the impact of the statements from the Forest Service and BLM fish biologists that they believed they were prohibited from considering this question. On the contrary, even granted the fact that the apperceptions of these two individuals may have been erroneous, the fact remains that they were operating under a set of assumptions which limited the scope of their input into the decisionmaking process on the issue of ACS compliance. Given the fact that the streamlined consultation process is expressly designed to achieve "consensus" decisionmaking, see note 1, supra, the effect of any such limitation, even if erroneously "self-imposed," on the utility of the end-product is clearly of a significant nature even if its direct impact is difficult to quantify.

On the other hand, as we noted above, the August 4, 1997, letter did not, by its own terms, implicate the Biological Opinion at issue herein. While it is true that the September 17, 1997, note to the record written by the Forest Service fish biologist did discuss, at length, the decisional process which led to the September 26, 1996, Biological Opinion, we agree with BLM that the thrust of his criticism was not directed to the Red Top sale involved herein. Thus, the September 17 note related that the September 26, 1996, Biological Opinion "included seven Roseburg BLM timber sales that featured regeneration harvest." It is to these sales that the author subsequently refers when he notes that the Level 1 Team had "expressed serious reservations" with respect to various sales, concerns which, according to the author, were never addressed. The problem with

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2/ It should be noted that a second Biological Opinion, this one from the U.S. Fish and Wildlife Service, was issued on Jan. 23, 1997, concerning impacts of the Red Top sale on the northern spotted owl. See Ex. 46. It is not asserted that this Opinion has any direct impact on the issue of compliance with the ACS.

Umpqua's argument as it relates to the instant appeal, however, is that an analysis of the activities approved in the September 26, 1996, Biological Opinion clearly shows that the Red Top sale is not one of the sales to which the Forest Service fish biologist objected.

The Biological Opinion lists the proposed actions which were being examined in Table 1. See Ex. 53, at 7. Besides numerous programmatic actions (such as road maintenance) which covered all units involved, 3/ the Biological Opinion encompassed a total of 52 separate timber sales occurring in 5 different administrative units. Of these, a total of nine timber sales were within the Roseburg District. These sales were: the Red Top timber sale, the Kernal John timber sale, the Louis Weaver timber sale, the Black Hole timber sale, the Idelyld timber sale, the Conley timber sale, the Sampson Butte commercial thin, the Summit Creek timber sale, and the Yellow Creek Mountain timber sale. But, while the Biological Opinion cleared a total of nine timber sales in the Roseburg District, the Forest Service fish biologist's objections were limited to "seven Roseburg BLM timber sales that featured regeneration harvest." Obviously, he excluded from his objection the Sampson Butte commercial thin. And, inasmuch as all of the remaining sales, with the exception of the Red Top sale, were expressly designed as regeneration harvests, it is equally clear that he excluded the Red Top sale from the scope of his criticism. 4/

In essence, regardless of how compromising the assertions of these members of the Level 1 team might be deemed to be with respect to other actions approved, they simply are not compelling with respect to the Red Top sale at issue herein. Nor has Umpqua submitted any other information which would tend to establish that this sale is contrary to ACS objectives.

Those appealing to this Board have the affirmative burden of establishing error in the decision below. See generally In re Lick Gulch Timber Sale, 72 IBLA 261 (1983). On this issue, Umpqua has simply failed to discharge its burden.

Umpqua has raised a number of subsidiary issues in its appeal. While we have considered these matters, we believe that the decision below more than adequately dealt with them and will, therefore, not explore them further herein.

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3/ The Sept. 26, 1996, Biological Opinion covered actions in the Siuslaw, Siskiyou, and Umpqua National Forests as well as actions in the Coos Bay, Medford, and Roseburg BLM Districts.

4/ While the Red Top sale does, indeed, contemplate a regeneration cut in two of its six units as the best way in which to salvage the downed and damage timber, it is still a salvage operation. In contrast, as BLM points out in its Answer, the other seven sales were designed as regeneration harvests, not salvage sales. See Answer at 5.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed and the request for a stay is denied as moot.

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James L. Burski  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge